

Date

Port of Apollo Bay Management Agreement

HEAD, TRANSPORT FOR VICTORIA

and

COLAC OTWAY SHIRE COUNCIL

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Port of Apollo Bay Management Agreement

DATE

BETWEEN

HEAD, TRANSPORT FOR VICTORIA, a statutory office established under the *Transport Integration Act 2010*, on behalf of the Crown in right of the State of Victoria of Level 21,1 Spring Street, Melbourne, Victoria, 3000

(TFV)

AND

COLAC OTWAY SHIRE COUNCIL a port manager of a local port established under the *Port Management Act 1995* of 2-6 Rae Street, Colac, Victoria, 3250

(Port Manager)

RECITALS

- A. TFV is responsible for managing the overall funding program for local ports and providing broad strategic planning services for local port facilities across the State.
- B. The Port Manager manages and administers the Port as part of its statutory functions as set out in the *Port Management Act 1995*.
- C. TFV has agreed to provide the Port Manager with funding for the administration and management of the Port.
- D. This Agreement sets out the terms and conditions on which the Port Manager will manage and administer the Port and TFV will provide funding for the management and administration of the Port.

THIS AGREEMENT WITNESSES

1. DEFINITIONS

In this document unless expressed or implied to the contrary:

Agreement means this agreement;

Asset Management Plan means an asset management plan prepared by the Port Manager and approved by TFV;

Business Day means a day on which banks are open for general banking business in Melbourne, Australia, other than a Saturday, Sunday or public holiday;

Business Plan means a business plan prepared in accordance with clause 5 and which contains, as a minimum, the information set out in Schedule 5;

Commencement Date means the date specified at item 2 of Schedule 1;

Completion Date means the date specified at item 3 of Schedule 1;

Dispute Guidelines means the Guidelines for the conduct of disputes between different public sector bodies within the State of Victoria issued by the Attorney-General, 2008, or any replacement dispute guidelines;

Financial Year means:

- (a) the period commencing on the Commencement Date and ending on the following 30 June;
- (b) each successive period of twelve months commencing on 1 July and ending on 30 June; and
- (c) the period commencing on 1 July immediately preceding the date of termination of this Agreement and ending on the date of such termination.

Fixed Asset means any asset that is static or immovable within the Port listed in Schedule 2, or other asset as agreed in writing from time to time;

Floating Plant means all vessels, boats, barges and associated equipment to be used in relation to the Port listed in Schedule 2, or other asset as agreed in writing from time to time;

Incident means an event that occurs within the Port that causes or has the potential to cause personal injury, property damage or environmental damage and is likely to result in an insurance claim or other action against the Port Manager, TFV or the Department of Economic Development, Jobs, Transport and Resources;

Indemnity Policy means the Victorian Government's policy titled "Government policy and guidelines: indemnities and immunities, June 2008", or any replacement policy;

Non-Fixed Asset means any asset that is portable or movable other than Floating Plant to be used in relation to the Port and includes plant, vehicles, office equipment and furniture;

Port means the local port specified in Schedule 1;

Port Manager means the entity appointed to manage the Port by the Governor in Council under section 44A of the *Port Management Act 1995* and named at item 1 of Schedule 1;

Project Agreement means an agreement between TFV and the Port Manager for Project Funding substantially in the form attached at Schedule 3;

Project Funding means the funding provided by TFV or other Government entity in accordance with clauses 6.4 and 6.5 for the construction, reconstruction or replacement of Fixed Assets or Floating Plant;

Representatives means the representatives of each of the parties for the day to day administration of this Agreement nominated in writing from time to time, initially being the persons set out at items 6 and 7 of Schedule 1;

Safety and Environment Management Plan means a management plan prepared in accordance with Part 6A of the *Port Management Act 1995*;

State means the Crown in right of the State of Victoria; and

Term means the term set out in clause 3.

2. GOVERNING PRINCIPLES AND PURPOSE

2.1 Guiding Principle

The parties will cooperate at all times to ensure that both parties meet their respective obligations under this Agreement.

2.2 Role of this Agreement

The role of this Agreement is to set out the terms and conditions on which:

2.2.1 the Port Manager will:

2.2.1.1 manage and administer the Port; and

2.2.1.2 consult with TFV in relation to the management and administration of the Port; and

2.2.2 TFV will fund the management and administration of the Port.

2.3 Status of Agreement

The parties acknowledge and agree that this Agreement is legally enforceable.

2.4 Agreement to Negotiate

The parties agree to use best endeavours to negotiate, in the last 12 months of this Agreement, the terms of a new management agreement relating to the management and administration of the Port that will commence on the day following the Completion Date.

2.5 Revocation of Appointment as Port Manager

The parties acknowledge and agree that the termination or the expiry of this Agreement will not revoke the appointment of the Port Manager as port manager of the Port. Such appointment will continue unless and until such time as it is revoked by Governor in Council pursuant to section 44A(2)(a) of the *Port Management Act 1995*. If the Port Manager requests that its appointment as port manager of the Port is to be revoked by Governor in Council, TFV will use its best endeavours to expedite this matter through the Governor in Council process.

2.6 Representatives

The Representatives of the parties will be responsible for the day to day management of this Agreement and any communications under this Agreement.

3. TERM

The Term of this Agreement is specified at Item 4 of Schedule 1 and will commence on the Commencement Date and will expire on the Completion Date unless this Agreement is terminated in accordance with clause 12.

4. OWNERSHIP AND MANAGEMENT OF ASSETS

4.1 Fixed Assets

- 4.1.1 The State owns the Fixed Assets and Floating Plant and will retain ownership of the Fixed Assets and Floating Plant.
- 4.1.2 TFV controls the Fixed Assets and Floating Plant on behalf of the State.
- 4.1.3 The Port Manager will be responsible for the management, maintenance and operational control of the Fixed Assets and Floating Plant on behalf of TFV.
- 4.1.4 Ownership of the Fixed Assets and Floating Plant will not transfer to the Port Manager.
- 4.1.5 The Port Manager must not dispose, remove, close permanently or change the use of any Fixed Assets or Floating Plant unless it has notified, consulted with and obtained the prior written approval of TFV.
- 4.1.6 The Port Manager must provide written notice to TFV as soon as practicable after closing any Fixed Asset due to:
 - 4.1.6.1 an emergency situation; or
 - 4.1.6.2 where the Fixed Asset has been damaged and is unsafe for public use;

and the notice must include the proposed date of re-opening of the Fixed Asset.

4.2 Non-Fixed Assets

- 4.2.1 Non-Fixed Assets are the property of the Port Manager and, subject to clauses 4.2.2 and 4.2.3, may be sold or otherwise disposed of, replaced, repaired or dealt with by the Port Manager as its own property.
- 4.2.2 If this Agreement terminates as referred to in clause 12.1 or otherwise, the Non-Fixed Assets owned by the Port Manager at the date of termination will cease to be property of the Port Manager and will immediately transfer to the property of TFV.
- 4.2.3 The Port Manager must not sell or otherwise dispose of a Non-Fixed Asset with a current replacement value exceeding \$50,000 without giving 1 month's prior written notice to TFV and offering first right of purchase to the port managers of all other Victorian local ports.

4.3 Maintenance

The Port Manager must manage, repair, maintain in good condition and, where necessary, replace all assets to the best of its ability, within the constraints of available funding and income, and in accordance with good business practice.

4.4 Permitted Use of Assets

The Port Manager must only use the Fixed Assets, Non-Fixed Assets and Floating Plant for the management and administration of the Port unless otherwise approved in writing by TFV.

4.5 Asset Register

4.5.1 The Port Manager must maintain a register of all assets held or managed by it.

4.5.2 The Port Manager must record the Fixed Assets, Non-Fixed Assets and Floating Plant in the asset register in accordance with Australian Accounting Standards.

4.5.3 The Port Manager will, by no later than 31 March in each year of the Term, submit to TFV a copy of the asset register maintained in accordance with this clause 4.5.

5. BUSINESS PLAN

5.1 By 31 March in each year of the Term, the Port Manager must prepare and submit to TFV a Business Plan for the 3 Financial Years commencing on the immediately following 1 July which establishes a planning framework for the management and administration of the Port and forecasts for end of year position for the current Financial Year.

5.2 The Business Plan must:

5.2.1 be reviewed by TFV by 31 May of that year and TFV must, as soon as practicable after that date, advise the Port Manager of approval or otherwise, and where necessary, provide particulars of items which have not been approved;

5.2.2 form the basis of budget proposals for the management and administration of the Port;

5.2.3 include proposed major works for the 3 Financial Years commencing on 1 July of that year; and

5.2.4 be prepared following a review of the previous year's Business Plan with variations reported on and submitted in conjunction with the annual budget submission.

6. FUNDING

OPERATING AND MAINTENANCE FUNDS

- 6.1 TFV agrees to provide the Port Manager with operating and maintenance funds for the operation and maintenance of Assets, payment of wages and for the management and administration of the Port.
- 6.2 TFV will:
- 6.2.1 confirm the operating and maintenance funds that TFV will provide to the Port Manager for each Financial Year;
 - 6.2.2 provide an estimate of operating and maintenance funds that TFV anticipates that it will provide to the Port Manager for future Financial Years; and
 - 6.2.3 provide operating and maintenance funds to the Port Manager for each Financial Year,

in accordance with the timetable set out below:

Date by which TFV will provide confirmation of operating and maintenance funds and an estimate of operating and maintenance funds for future Financial Years	Financial Year to which the confirmation of operating and maintenance funds will relate	When TFV will pay the operating and maintenance funds to the Port Manager	Financial Years to which the estimate of operating and maintenance funding will relate
30 June 2017	1 July 2017 – 30 June 2018	On or after 1 July 2017	1 July 2018 – 30 June 2019 1 July 2019 – 30 June 2020
30 June 2018	1 July 2018 – 30 June 2019	On or after 1 July 2018	1 July 2019 – 30 June 2020 1 July 2020 – 30 June 2021
30 June 2019	1 July 2019 – 30 June 2020	On or after 1 July 2019	1 July 2020 – 30 June 2021 1 July 2021 – 30 June 2022

- 6.3 In determining the amount of operating and maintenance funds described in clauses 6.2.1 and 6.2.2, TFV will take into account the most recent Business Plan submitted by the Port Manager.

PROJECT FUNDING

- 6.4 TFV may provide to the Port Manager an amount of Project Funding. All Project Funding that is provided by TFV to the Port Manager will be governed by the terms of a Project Agreement.
- 6.5 TFV will determine the amount of Project Funding referred to in clause 6.4 (if any) by reference to:
- 6.5.1 the priorities identified in the Business Plan;
 - 6.5.2 the priorities identified in the Asset Management Plan prepared in accordance with clause 10;
 - 6.5.3 the priorities identified in the Safety and Environment Management Plan;
 - 6.5.4 the priorities identified by TFV across the whole of the Victorian local ports program; and
 - 6.5.5 available funding under the Victorian local ports program or available funding under other Victorian Government sources.

USE OF FUNDS

- 6.6 The Port Manager must use the funds provided to it under this Agreement:
- 6.6.1 in accordance with this Agreement;
 - 6.6.2 in accordance with the Business Plan; and
 - 6.6.3 in accordance with any Project Agreement.

FEES AND CHARGES

- 6.7 The Port Manager will utilise its legislative power to levy fees and charges for services provided, having regard to issues of equity of use and access, to maximise the user pays component of its income. In addition, to the extent permitted by legislation, the Port Manager must endeavour to recover the full cost of all utilities (such as electricity and water) provided to Port users.

UNFORESEEN EVENT

- 6.8 In the event that storms or other serious unforeseen events result in significant damage to any Fixed Assets, Non-Fixed Assets or Floating Plant, the Port Manager may submit to TFV, no later than 30 days following the storm or other serious unforeseen event, an application to access repairs, maintenance or other funds for the purpose of repair or of reimbursement of costs.
- 6.9 Any application for funds in accordance with clause 6.8 must include details of the material and labour costs required to undertake the response and rectification works, and may only include costs incurred over and above the normal operating and maintenance budget.

- 6.10 Upon receipt of a submission made under clause 6.8, TFV will reassess the state-wide repairs and maintenance program for Victorian local ports and make payments as determined appropriate.
- 6.11 If TFV does not provide funding for the full cost of performing any necessary repairs and maintenance following a submission from the Port Manager under clause 6.8, nothing in this Agreement shall require the Port Manager to itself provide funding from its own resources. Nothing in this clause in any way excludes, limits or reduces the Port Manager's statutory functions as a port manager of a local port under the *Port Management Act 1995*.

GENERAL

- 6.12 The Port Manager will use its best endeavours to invest any funds provided by TFV or other Government entity for the Port in accordance with Standing Direction 3.7.2.3 issued by the Minister for Finance under the *Financial Management Act 1994* (as varied or replaced).
- 6.13 If:
- 6.13.1 the Port Manager does not expend the funds (or any part of the funds) during the Financial Year in which the funds are provided; and/or
- 6.13.2 the Port Manager earns interest on the funds,
- the Port Manager is permitted to retain those funds (including any interest earned) and must use those funds in accordance with the timetable for their expenditure approved by TFV under clause 7.1.2.

7. FINANCIAL REPORTING

7.1 Annual Budget Process

- 7.1.1 The Port Manager must prepare and submit to TFV by no later than 31 March in each year of the Term a proposed annual budget for the upcoming Financial Year which shows:
- 7.1.1.1 estimated revenue and sources of revenue of the Port including fees, charges and grants;
- 7.1.1.2 other sources of funding of the Port of an operating nature;
- 7.1.1.3 details of any funds provided to the Port Manager during a previous Financial Year which it is anticipated will remain unexpended and details of and a timetable for their expenditure;
- 7.1.1.4 a schedule of proposed fees and charges to be levied by the Port Manager for services provided in accordance with clause 6.7 of this Agreement;
- 7.1.1.5 direct employment expenses and other direct operating expenses of the Port, including any associated overheads;
- 7.1.1.6 detailed forecast of estimated major works (including associated dredging) necessary for the Port, including total

estimated cost for each project, for the following three years, listed in order of priority;

7.1.1.7 reason for the requirement of any major works (eg. addresses risk or adds value to the ports business); and

7.1.1.8 details of forecast asset maintenance expenditure.

7.1.2 TFV will, by 31 May of that year, review the budget submitted and will, as soon as practicable after that date, advise the Port Manager of approval or otherwise and, where necessary, provide particulars of items which have not been approved.

7.2 Accounts

7.2.1 The Port Manager must maintain a separate cost centre or identifiable charge line in its accounts for its functions as a port manager.

7.2.2 The Port Manager must comply with Australian Accounting Standards including the use of accrual not cash accounting.

7.2.3 Administrative costs (including all staff costs not directly attributable to on-ground works and services), must be separated from direct operating expenditure on facilities and functions.

7.2.4 Expenditure must be allocated to identifiable facilities, assets or services.

7.3 Annual Reporting

7.3.1 The Port Manager will, by no later than 30 September in each year of the Term, prepare and submit to TFV a report on the outcomes of the previous Financial Year's Business Plan and budget as well as the following annual accounts and statements:

7.3.1.1 Financial reports – to show budget and actual revenue and expenditure and commentary on material variations and be prepared on an accrual basis

7.3.1.1.1 An operating statement showing revenue and expenditure.

7.3.1.1.2 A statement showing capital expenditure.

7.3.1.1.3 A statement of funds provided to the Port Manager during previous Financial Years that remain unexpended, including a reasonable allocation of interest earned on accumulated cash funds over the year; and a statement detailing cash which is earmarked for specific purposes (e.g. employee benefits) showing committed and uncommitted cash (e.g. future major works).

7.3.1.1.4 A statement showing maintenance expenditure (annual cost of asset maintenance for fixed

assets and major plant and equipment) for each class of asset (eg. jetties, navigation aids, etc.).

7.3.1.1.5 A statement of cash flows.

7.3.1.1.6 A statement of financial position (excluding valuations for Crown Land).

7.3.1.1.7 A statement of the accounting policy employed for the preparation of the annual accounts and statements.

7.3.1.1.8 Any known contingent liabilities.

7.3.1.2 Program reporting (in respect of capital and recurrent works)

7.3.1.2.1 Details of operations in comparison to budget.

7.3.1.2.2 Cash flow details in comparison to budget.

7.3.1.2.3 Details of works progress against works program.

7.3.1.2.4 A commentary in respect of any substantial variation regarding the preceding items.

7.3.1.2.5 Where dredging operations are performed, a statement on the cost of the dredging, an estimate of the amount of dredging performed (either number of days in operation or volumes dredged) and whether access to the Port has been restricted by a failure/inability to dredge.

7.3.1.2.6 Significant (known or anticipated) events that may adversely impact on the Port Manager's ability to perform its task as port manager.

7.3.1.3 Incident reporting

7.3.1.3.1 A summary of each and every Incident which was reported or recorded in the Port during the course of the year.

7.3.1.3.2 A separate report on any Incident for which further information was requested through the Port Manager's insurers.

7.3.2 The report provided to TFV in accordance with clause 7.3.1 must contain, as a minimum, the information set out in Schedule 4.

7.4 Auditing

The annual accounts to be provided to TFV in accordance with clause 7.3.1.1 must be prepared in accordance with Australian Accounting Standards and audited and signed off by an independent certified company auditor in accordance with Australian Auditing Standards.

8. INSURANCE AND LIABILITY

8.1 Insurance

- 8.1.1 The Port Manager will insure and keep insured the Non-Fixed Assets against damage by theft, fire, explosion, storm and tempest, riots, strikes, accidental and malicious damage, earthquake, impact by vehicles vessels or aircraft, internal water and flood, as appropriate, and in accordance with good business practice.
- 8.1.2 TFV will maintain or will ensure the following insurance cover is maintained as appropriate:
- 8.1.2.1 insurance for the Fixed Assets (under an Industrial Special Risks policy);
 - 8.1.2.2 Port Operators Liability; and
 - 8.1.2.3 Marine Hulls (Floating Plant).
- 8.1.3 TFV will pay any deductibles (excess) arising under the insurance policies listed in clause 8.1.2 or will ensure any deductibles (excess) are paid or will provide self insurance at an appropriate level in consultation with the Port Manager.
- 8.1.4 If there is an Incident, the Port Manager must notify TFV immediately and provide written details about the Incident in the form requested by TFV.

8.2 Indemnities

In accordance with clause 5.3.12 of the Indemnity Policy, the parties acknowledge that the use of contractual indemnities between Government entities is not recommended. The parties agree that this Agreement is an appropriate mechanism to identify and state the respective roles and responsibilities of each of the parties.

Any dispute relating to any actions, claims or losses (including liability for loss) arising from or in connection with this Agreement shall be determined in accordance with clause 11.

9. RISK MANAGEMENT

- 9.1 The Port Manager must undertake a risk audit as part of its Business Plan preparation and report to TFV by 31 March in each year of the Term on actions taken to address identified risks.
- 9.2 The Port Manager must develop and seek approval for its Safety and Environment Management Plan as required in Part 6A of the *Port Management Act 1995*, and will monitor, report on and update its plan as required. In addition to the requirements set out in section 91D of the *Port Management Act 1995*, the Port Manager must prioritise the measures and strategies to be implemented by the Port Manager to prevent or reduce risks associated with the operation of the Port in the Safety and Environment Management Plan.

10. ASSET MANAGEMENT PLAN

The Port Manager must:

- 10.1 monitor, report on and update its Asset Management Plan as required under that plan;
- 10.2 prioritise asset maintenance projects in its Asset Management Plan; and
- 10.3 undertake a detailed review of its Asset Management Plan every three years (where the relevant years are specified in Schedule 6), and submit it to TFV by 30 September of the years specified in Schedule 6, for TFV's approval.

11. DISPUTE RESOLUTION

If there is a dispute between the parties related to the Agreement, then the dispute will be resolved in accordance with the Dispute Guidelines.

12. TERMINATION

12.1 Termination Events

- 12.1.1 The parties may agree in writing to terminate this Agreement at any time.
- 12.1.2 This Agreement will immediately terminate if the Port Manager ceases to be a port manager under the *Port Management Act 1995* in respect of the Port.
- 12.1.3 Either party may terminate this Agreement in the event that the other party commits a breach of this Agreement and fails to remedy the breach within 90 days of notice of the breach and where the breach has not been resolved by the procedure in clause 11 of this Agreement.

12.2 Consequences of Termination

If this Agreement is terminated under clause 12.1:

- 12.2.1 clause 4.2.2 will apply; and
- 12.2.2 the Port Manager will return any funds provided to it by TFV under this Agreement which have not been expended by the Port Manager in accordance with this Agreement.

13. GENERAL

13.1 Amendment

This Agreement may only be varied or replaced by a document duly executed by the parties.

13.2 Entire Understanding

This Agreement contains the entire understanding between the parties as to the subject matter contained in it.

13.3 **Waiver and Exercise of Rights**

13.3.1 A single or partial exercise or waiver of a right relating to this Agreement does not prevent any other exercise of that right or the exercise of any other right.

13.3.2 No party will be liable for any loss or expense incurred by another party caused or contributed to by the waiver, exercise, attempted exercise, failure to exercise or delay in the exercise of a right.

13.4 **Assignment**

Neither party may assign its rights under this Agreement without the prior written consent of the other party.

13.5 **Time of the Essence**

Time is of the essence as regards all dates, periods of time and times specified in this Agreement.

13.6 **GST**

13.6.1 In this clause 13.6 unless expressed or implied to the contrary:

Adjustment has the same meaning given to that term in the GST Act.

Adjustment Note has the same meaning given to that term in the GST Act.

Consideration means consideration payable under this Agreement in return for a Taxable Supply, but does not include any amount on account of GST.

GST has the same meaning given to that term in the GST Act.

GST Act means *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

GST Amount has the same meaning given to that term in clause 13.6.3.

Input Tax Credit has the same meaning given to that term in the GST Act, but also includes a reduced input tax credit under Division 70 and an adjusted input tax credit under Division 132 of the GST Act.

Recipient has the same meaning given to that term in the GST Act.

Supplier means the entity making a Supply to the Recipient.

Supply has the same meaning given to that term in the GST Act.

Tax Invoice has the same meaning given to that term in the GST Act.

Taxable Supply has the same meaning given to that term in the GST Act.

- 13.6.2 Except as otherwise provided by this clause, all Consideration payable under this Agreement in relation to any Supply is inclusive of GST.
- 13.6.3 To the extent that any Supply under this Agreement constitutes a Taxable Supply, the Consideration payable by the Recipient to the Supplier will be increased by the applicable amount of GST (**GST Amount**), which shall be calculated by multiplying the amount upon which GST is payable by the prevailing rate of GST.
- 13.6.4 Any GST Amount must be paid by the Recipient to the Supplier at the same time and in the same manner as the relevant Consideration is paid or given under this Agreement, without any right of set-off or deduction (unless otherwise provided in this Agreement).
- 13.6.5 If this Agreement requires the Recipient to pay, reimburse or contribute to any expense, loss or outgoing suffered or incurred by the Supplier, the amount which the Recipient must pay, reimburse or contribute will be the amount net of any Input Tax Credits to which the Supplier is entitled to claim in respect of the outgoing, in addition to any GST Amount if the payment, reimbursement or contribution constitutes a Taxable Supply by the Supplier to the Recipient.
- 13.6.6 The Supplier must issue the Recipient with a valid Tax Invoice at or prior to the time of payment of any GST Amount.
- 13.6.7 To the extent that any Adjustment occurs in relation to a Taxable Supply, the Supplier must issue an Adjustment Note to the Recipient within five Business Days of becoming aware of the Adjustment, and any payment necessary to give effect to such Adjustment must be made within five Business Days after the date of receipt of the Adjustment Note.

14. NOTICES

14.1 Service of Notice

A notice or other communication required or permitted, under this Agreement, to be served on a person must be in writing and may be served:

- 14.1.1 personally on the person specified in clause 14.2.1;
- 14.1.2 by leaving it at the person's current address for service;
- 14.1.3 by posting it by prepaid post addressed to that person at the person's current address for service; or
- 14.1.4 by email to the person's current email address for service, provided that the party giving notice obtains a confirmation report or other written evidence that the email reached the recipient's mailbox.

14.2 Particulars for Service

- 14.2.1 The particulars for service of each of the parties are the particulars for their Representatives set out in Schedule 1.

14.2.2 Any party may change the address for service by giving notice to the other parties.

14.2.3 If the person to be served is a company, the notice or other communication may be served on it at the company's registered office.

14.3 Time of Service

A notice or other communication is deemed served:

14.3.1 if served personally or left at the person's address, upon service;

14.3.2 if posted within Australia to an Australian address, six Business Days after posting and in any other case, seven Business Days after posting;

14.3.3 if served by email, subject to clause 14.3.4 at the time the notice or other communication comes to the attention of the addressee;

14.3.4 if received after 6.00pm in the place of receipt or on a day which is not a Business Day, at 9.00am on the next Business Day.

15. INTERPRETATION

15.1 Governing Law and Jurisdiction

This Agreement is governed by and is to be construed in accordance with the laws of Victoria. Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Victoria and waives any right to object to proceedings being brought in those courts.

15.2 Persons

In this Agreement, a reference to:

15.2.1 a person includes a firm, partnership, joint venture, association, corporation or other corporate body;

15.2.2 a person includes the legal personal representatives, successors and permitted assignees of that person; and

15.2.3 any body which no longer exists or has been reconstituted, renamed, replaced or whose powers or functions have been removed or transferred to another body or agency, is a reference to the body which most closely serves the purposes or objects of the first-mentioned body.

15.3 Legislation

In this Agreement, a reference to a statute includes regulations under it and consolidations, amendments, re-enactments or replacements of any of them.

15.4 This Agreement, Clauses and Headings

In this Agreement:

15.4.1 a reference to this or other document includes the document as varied or replaced regardless of any change in the identity of the parties;

- 15.4.2 a reference to a clause, schedule, appendix or annexure is a reference to a clause, schedule, appendix or annexure in or to this Agreement all of which are deemed part of this Agreement;
- 15.4.3 a reference to writing includes all modes of representing or reproducing words in a legible, permanent and visible form;
- 15.4.4 headings and sub-headings are inserted for ease of reference only and do not affect the interpretation of this Agreement;
- 15.4.5 where an expression is defined, another part of speech or grammatical form of that expression has a corresponding meaning; and
- 15.4.6 where the expression 'including' is used, it means 'including without limitation'.

15.5 **Severance**

- 15.5.1 If a provision in this Agreement is held to be illegal, invalid, void, voidable or unenforceable, that provision must be read down to the extent necessary to ensure that it is not illegal, invalid, void, voidable or unenforceable.
- 15.5.2 If it is not possible to read down a provision as required in this clause, that provision is severable without affecting the validity or enforceability of the remaining part of that provision or the other provisions in this Agreement.

15.6 **Counterparts**

This Agreement may be executed in any number of counterparts all of which taken together constitute one instrument.

15.7 **Number and Gender**

In this Agreement, a reference to:

- 15.7.1 the singular includes the plural and vice versa; and
- 15.7.2 a gender includes the other genders.

15.8 **Relationship of Parties**

This Agreement is not intended to create a partnership or joint venture relationship between the parties.

EXECUTED by the parties

SIGNED by the **HEAD, TRANSPORT**)
FOR VICTORIA on behalf of the)
CROWN IN RIGHT OF THE STATE)
OF VICTORIA in the presence of:

Witness (Signature)

Gillian Miles
Head, Transport for Victoria

Witness (Print name)

Date:

THE COMMON SEAL of the **COLAC**)
OTWAY SHIRE COUNCIL was)
hereunto affixed in the presence of:)

Chief Executive Officer (Signature)

Chief Executive Officer (Print name)

Date:

Schedule 1 – Representatives and Port Details

Item	Item Description	Details
1	Port Manager	Colac Otway Shire Council
2	Commencement Date	1 July 2017
3	Completion Date	30 June 2020
4	Term	3 years
5	Annual operating and maintenance funds	Amount to be confirmed annually in accordance with clause 6.2
6	TFV's Representative (for day to day administration of this Agreement)	Person: Marcus Higgins Title: Senior Project Officer Address: Transport For Victoria, GPO Box 4509, Melbourne, Victoria, 3001 Ph: (03) 8392 6466 Email address: marcus.higgins@ecodev.vic.gov.au
7	Port Manager's Representative (for day to day administration of this Agreement)	Person: Debbie Leeson-Rabie Title: Manager Services and Operations Address: PO Box 283, Colac, Victoria, 3250 Email address: Debbie.Leeson-Rabie@colacotway.vic.gov.au

Description of Port

The land and waters declared to be port land and waters of the Port of Apollo Bay by Order dated 31 January 1996, published in Government Gazette number G4 on 1 February 1996, pages 271-273 (as amended or replaced).

Schedule 2 – Fixed Assets and Floating Plant

Fixed Assets

Wharves, jetties, walls

- East End Jetty wall
- Western Bund wall
- Point Bunbury Groyne
- Main Eastern Breakwater
- Lee Breakwater
- East End Jetty
- New Boat Ramp Jetty
- Western Marina
- Eastern Marina
- Marina walkway
- Marina approach walkway
- Fishermans Landing
- Retaining wall north of Depot

Buildings/Depot/Equipment

- Depot paved area
- Undercover area (between workshop and storage)
- Boat ramp
- Boom gate at main entrance
- Yard surrounds - General yard
- Workshop
- Depot office
- Winch shed
- Store building
- Open shed
- Fencing around yards
- Main gravel carpark
- Main approach road
- Main Eastern Breakwater road
- Approach road western wall

Slipway

- Slipway comprising:
 - Steel Framed Track Support
 - Concrete Track Support
 - Retaining Wall
 - Concrete Paved Apron
 - Concrete Surrounds
 - Winch 35 tonne
 - Winch Cable
 - Cradles

Navigation aids

- Front harbour transit beacon
- Main Eastern Breakwater beacon
- Point Bunbury front beacon

Harbour rear transit beacon
Point Bunbury rear beacon
Hayley Point front beacon
Hayley Point rear beacon
East End Jetty daymark
Skenes Creek front nav beacon
Skenes Creek rear nav beacon
Port hand floating beacon (buoy)

Floating Plant

Apollo dredge and 180m floating dredge pipeline with floats
Corsair – workboat
Urchin – workboat
Barrum – workboat

Schedule 3 – Project Agreement

Date / /

**[Insert Project Title]
Funding Agreement**

HEAD, TRANSPORT FOR VICTORIA

and

[PORT MANAGER]

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Funding Agreement

DATE / /

BETWEEN

HEAD, TRANSPORT FOR VICTORIA, a statutory office established under the *Transport Integration Act 2010*, on behalf of the Crown in right of the State of Victoria of Level 21, 1 Spring Street, Melbourne, Victoria, 3000 (**TFV**)

AND

[PORT MANAGER] a port manager of a local port established under the *Port Management Act 1995* of **[address of the Port Manager]** (**Port Manager**)

RECITALS

- A. This Agreement sets out the terms and conditions on which the Port Manager will deliver the Project and TFV will provide the Funds for the Project.
- B. **[Insert recital(s) specific to the Project, if necessary.]**

THIS AGREEMENT WITNESSES

1. DEFINITIONS

In this document unless expressed or implied to the contrary:

Adjustment has the same meaning given to that term in the GST Act.

Adjustment Note has the same meaning given to that term in the GST Act.

Agreement means this agreement, including the Schedules.

Asset means any asset specified in item 6 of Schedule 1 that is created or acquired as a result of the Project.

Business Day means a day on which banks are open for general banking business in Melbourne, Australia, other than a Saturday, Sunday or public holiday in Victoria.

Commencement Date means the date specified in item 1 of Schedule 1.

Completion Date means the date specified in item 2 of Schedule 1.

Conflict Direction has the same meaning given to that term in clause 9.3.2.

Conflict Notice has the same meaning given to that term in clause 9.3.1.

Conflict of Interest means an actual or potential conflict of interest, or a conflict of interest that could reasonably be perceived to exist, between the Port Manager and TFV in relation to the performance of the Port Manager's obligations under this Agreement.

Consideration means consideration payable under this Agreement in return for a Taxable Supply, but does not include any amount on account of GST.

Dispute Guidelines means the “Guidelines for the conduct of disputes between different public sector bodies within the State of Victoria” issued by the Attorney-General, 2008, or any replacement dispute guidelines.

Fixed Asset has the meaning given to that term in the Management Agreement.

Floating Plant has the meaning given to that term in the Management Agreement.

Funds means the sum of money to be provided by TFV to the Port Manager in accordance with this Agreement, specified in item 4 of Schedule 1.

GST has the same meaning given to that term in the GST Act.

GST Act means *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

GST Amount has the same meaning given to that term in clause 24.2.

Indemnity Policy means the Victorian Government’s policy titled “Government policy and guidelines: indemnities and immunities, June 2008”, or any replacement policy.

Input Tax Credit has the same meaning given to that term in the GST Act, but also includes a reduced input tax credit under Division 70 and an adjusted input tax credit under Division 132 of the GST Act.

Intellectual Property includes business names, copyrights, and all rights in relation to inventions, patents, registered or unregistered trade marks (including service marks), registered designs, and semi-conductor and circuit layouts, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

Management Agreement means the management agreement between TFV and the Port Manager commencing on or about 1 July 2017, as varied or replaced.

Milestones means the milestones described in Schedule 3.

Non-Fixed Asset has the meaning given to that term in the Management Agreement.

Payment Deliverables means each of the documents and other deliverables set out in Schedule 3, required to be delivered to TFV prior to payment of any instalment of the Funds.

Personnel means officers, employees, agents and subcontractors.

Port Manager's Representative means the person nominated by the Port Manager in writing from time to time, initially being the person named in item 9 of Schedule 1.

Project means the works described in the Project Brief.

Project Brief means the project brief in Schedule 2.

Project Reference Group has the same meaning given to that term in clause 12.1.

Proposed Assignee has the same meaning given to that term in clause 16.1.

Recipient has the same meaning given to that term in the GST Act.

Relevant Legislation means: any Act, regulation, rule, ordinance, proclamation, by-law or similar statutory instrument, whether of the Commonwealth, State, local or other duly constituted Committee.

Schedule means a schedule to this Agreement.

Supplier means the entity making a Supply to the Recipient.

Supply has the same meaning given to that term in the GST Act.

Tax Invoice has the same meaning given to that term in the GST Act.

Taxable Supply has the same meaning given to that term in the GST Act.

Term means the period specified in item 3 of Schedule 1 or such lesser period if this Agreement is terminated earlier in accordance with this Agreement.

TFV's Representative means the person nominated by TFV in writing from time to time, initially being the person holding the position specified in item 8 of Schedule 1.

2. TERM

This Agreement commences on the Commencement Date and continues for the Term.

3. PAYMENT OF FUNDS

3.1 Payment of Funds

- 3.1.1 Subject to the terms of this Agreement (including the conditions set out in clause 4), TFV will pay the Funds to the Port Manager in the instalments specified in Schedule 3.
- 3.1.2 Each instalment of the Funds is conditional upon the Port Manager achieving the Milestones or providing to TFV the Payment Deliverables.
- 3.1.3 TFV may in its absolute discretion extend any of the dates for the achievement of a Milestone or for the provision of any of the Payment Deliverables.
- 3.1.4 Where an instalment of the Funds is to be paid upon achievement of a Milestone, TFV will pay the relevant instalment of the Funds to the Port Manager within 30 Business Days of the later of:
 - 3.1.4.1 TFV providing the Port Manager with written approval (in accordance with clause 4.3) that the relevant Milestone has been achieved; and
 - 3.1.4.2 TFV receiving a tax invoice from the Port Manager for the instalment of the Funds that the Port Manager is entitled to be paid in accordance with this Agreement.
- 3.1.5 Where an instalment of the Funds is to be paid upon provision of Payment Deliverables, TFV will pay the relevant instalment of the Funds to the Port Manager within 30 Business Days of receiving a tax invoice from the Port Manager for the instalment of the Funds that the Port Manager is entitled to be paid in accordance with this Agreement.

3.2 Port Manager's Contribution to Project

- 3.2.1 In undertaking the Project, the Port Manager must contribute and use a sum of money (including any money provided to the Port Manager by third parties) that is necessary to complete the Project, as estimated in Item 5 of Schedule 1.
- 3.2.2 Where TFV determines in its discretion that the Port Manager has not complied with clause 3.2.1, TFV may terminate this Agreement pursuant to clause 19.

4. CONDITIONS ON FUNDING

4.1 Use of Funds

- 4.1.1 The Port Manager must only use the Funds for the Project in accordance with the terms and conditions of this Agreement. TFV will not reimburse the Port Manager for any expenditure that the Port Manager incurs in addition to the expenditure covered by the Funds.
- 4.1.2 Without limiting clause 4.1.1, the Port Manager must not use the Funds for any other purpose, including:
- 4.1.2.1 to meet the ongoing operational costs, salary subsidies or other administrative expenses of the Port Manager outside of those arising from or in connection with the Project, unless otherwise approved by the TFV Representative;
 - 4.1.2.2 as security for any form of finance;
 - 4.1.2.3 to meet existing debts, liabilities or obligations; or
 - 4.1.2.4 any purpose that is inconsistent with the stated priorities of TFV.

4.2 Funds to be Expended Before More Funds Paid

- 4.2.1 TFV may defer payment of the instalment of the Funds payable upon the Port Manager achieving a particular Milestone or providing particular Payment Deliverables until the Port Manager has expended all of the Funds that have been paid to it in relation to a previous Milestone or Payment Deliverables.
- 4.2.2 The Port Manager must continue to comply with its obligations under this Agreement, regardless of any payment of the Funds being deferred by TFV pursuant to clause 4.2.1.

4.3 Milestones and Payment Deliverables

- 4.3.1 The Port Manager must:
- 4.3.1.1 ensure that the Milestones are achieved and the Payment Deliverables are submitted to TFV within the periods or by the dates specified in Schedule 3 (or any extended date agreed by the TFV in accordance with clause 3.1.3);

- 4.3.1.2 notify TFV in writing when it considers that each Milestone has been achieved; and
 - 4.3.1.3 provide TFV with the evidence specified in Schedule 3 that each Milestone has been achieved.
- 4.3.2 After being notified by the Port Manager that a Milestone has been achieved and receiving evidence that the Milestone has been achieved, TFV will as soon as reasonably practicable:
- 4.3.2.1 provide the Port Manager with written approval that the Milestone has been achieved; or
 - 4.3.2.2 notify the Port Manager in writing that it does not agree that the Milestone has been achieved and will provide the Port Manager with an explanation as to why TFV does not consider that the Milestone has been achieved.
- 4.3.3 If TFV notifies the Port Manager under clause 4.3.2.2, the Port Manager must:
- 4.3.3.1 notify TFV in writing when it considers that the Milestone has been achieved; and
 - 4.3.3.2 provide TFV with evidence that the Milestone has been achieved.
- After being notified by the Port Manager that the Milestone has been achieved, TFV will consider the achievement of the Milestone in accordance with clause 4.3.2.
- 4.3.4 TFV may defer payment of the Funds if in its view the relevant Milestone has not been reached or Payment Deliverables have not been provided, until that Milestone has been reached or Payment Deliverables have been provided, in its view.
- 4.3.5 The Port Manager must continue to comply with its obligations under this Agreement, regardless of any payment of the Funds being deferred by TFV pursuant to clause 4.3.4.

4.4 Investment of Funds

The Port Manager must invest the Funds in accordance with Standing Direction 3.7.2.3 issued by the Minister for Finance under the *Financial Management Act 1994* (as varied or replaced).

4.5 Assets

The parties acknowledge and agree to treat any Asset as a Fixed Asset, Non-Fixed Asset or Floating Plant (whichever definition applies) and that the terms of the Management Agreement to apply to that Asset. This clause 4.5 survives the expiration of this Agreement.

5. UNEXPENDED FUNDS

Notwithstanding any other clause in this Agreement, upon completion of the Project, TFV will determine in consultation with the Port Manager, but at TFV's sole discretion, the purposes for which the Port Manager may retain and use any unexpended Funds and the conditions of such use.

6. PROJECT

- 6.1 In relation to the Project, the Port Manager must, at all times:
- 6.1.1 exercise due care, skill and judgment;
 - 6.1.2 act in accordance with the highest professional principles and standards;
 - 6.1.3 observe and comply with all Relevant Legislation;
 - 6.1.4 observe and comply with all applicable Victorian Government policies; and
 - 6.1.5 have regard to any matters notified in writing from time to time to the Port Manager by TFV's Representative.
- 6.2 The Port Manager must:
- 6.2.1 undertake and complete the Project in accordance with this Agreement;
 - 6.2.2 employ or engage sufficient Personnel (including, but not limited to, a project manager) who have appropriate qualifications, skills and experience, including experience in projects of a similar size and nature to the Project, to enable the Port Manager to successfully complete the Project in accordance with the Project Brief;
 - 6.2.3 ensure that it and its Personnel comply with all Relevant Legislation, awards or orders applying to matters within the scope of the Project;
 - 6.2.4 without limiting the generality of clause 6.2.3, obtain and comply with all permits, approvals and the like that are necessary to undertake the Project;
 - 6.2.5 implement appropriate monitoring and review processes to enable it to ensure that the Milestones are achieved and Payment Deliverables are provided in accordance with this Agreement; and
 - 6.2.6 ensure that it and any person employed or engaged to work on the Project does not:
 - 6.2.6.1 engage in unethical work practices; or

- 6.2.6.2 engage employees or subcontracted workers upon terms and conditions that will not meet industrial standards generally applicable in Victoria.
- 6.2.7 advise TFV promptly if there is a delay to the Project or change to the estimated cost or other aspect about the delivery of the Project in relation to which DEJDTR should reasonably be made aware.
- 6.3 The Port Manager must not subcontract any material part of the Project without TFV's prior written consent which may be withheld in TFV's absolute discretion or subject to conditions required by TFV. Notwithstanding any subcontract or any approval by TFV, the Port Manager will remain responsible for the acts, defaults and omissions of its subcontractors as if they were those of the Port Manager.

7. VARIATION OF PROJECT BRIEF

- 7.1 The Port Manager must not amend or vary the Project Brief without the prior written approval of TFV's Representative.
- 7.2 If the Port Manager wishes to amend or vary any aspect of the Project Brief, it may submit a proposal to TFV's Representative detailing the nature of the proposed amendment or variation and explaining why this amendment or variation is necessary.
- 7.3 TFV's Representative may, in his or her absolute discretion, approve or reject any proposed amendment or variation to the Project Brief. Such approval will not be unreasonably withheld.

8. NATURE OF RELATIONSHIP

8.1 No Employment Relationship Between Parties

The parties acknowledge and agree that:

- 8.1.1 this Agreement does not create a relationship of employment, partnership or joint venture between them; and
- 8.1.2 it is the express intention of the parties that any relationship of employment, partnership or joint venture between them is denied.

8.2 No Deemed Employment for Any Purpose

The Port Manager acknowledges and agrees that:

- 8.2.1 TFV is not and will not at any time be construed as the employer of the Port Manager or its employees for the purposes of any Relevant Legislation;
- 8.2.2 the Port Manager is solely responsible and liable for making any payments in respect of superannuation, payroll or any other tax, WorkCover levy or any similar payments in relation to its employees; and
- 8.2.3 under no circumstances will TFV be responsible for fulfilling the obligations set out in clauses 8.2.1 and 8.2.2.

9. CONFLICT OF INTEREST

9.1 Port Manager's Warranty

The Port Manager warrants to TFV that, at the time of entering into this Agreement, no Conflict of Interest exists, is likely to arise or could reasonably be perceived to exist.

9.2 Port Manager to Use Best Endeavours

The Port Manager must use its best endeavours to ensure that no Conflict of Interest arises or could reasonably be perceived to arise during the Term.

9.3 Port Manager to Notify of Potential Conflict

9.3.1 The Port Manager must immediately notify TFV's Representative of any matter that may give rise to a Conflict of Interest (**Conflict Notice**).

9.3.2 Upon receipt of a Conflict Notice, or whenever TFV's Representative considers that a Conflict of Interest has arisen or is likely to arise, TFV's Representative may direct the Port Manager to resolve the Conflict of Interest to the satisfaction of TFV's Representative within 14 Business Days (**Conflict Direction**).

9.3.3 Where TFV's Representative determines that the Port Manager has not resolved the Conflict of Interest to the sole and unfettered satisfaction of TFV's Representative within 14 Business Days of the issuance of the Conflict Direction, TFV may terminate this Agreement pursuant to clause 19.

10. TFV'S REPRESENTATIVE

10.1 TFV's Representative will:

10.1.1 represent TFV and carry out its functions as an agent of TFV in connection with this Agreement; and

10.1.2 be available at all reasonable times for consultation with the Port Manager's Representative in connection with any matter arising under this Agreement.

10.2 Except as otherwise provided by this Agreement, TFV's Representative may give a direction orally, but TFV's Representative must confirm an oral direction in writing as soon as practicable.

11. PORT MANAGER'S REPRESENTATIVE

11.1 The Port Manager's Representative will:

11.1.1 represent the Port Manager and be deemed to be the agent of the Port Manager in relation to any matter arising under this Agreement, including any decision made or information given or received by the Port Manager; and

- 11.1.2 be available at all reasonable times for consultation with TFV's Representative in connection with any matter arising under this Agreement.
- 11.2 TFV may rely on any statement or representation made by the Port Manager's Representative and that statement or representation shall be binding on the Port Manager as if it had been made by the Port Manager itself.

12. GOVERNANCE

12.1 Project Reference Group

If requested by either TFV or the Port Manager, TFV and the Port Manager must establish a committee (**Project Reference Group**) comprising up to two members from each of TFV and the Port Manager with the functions set out in clause 12.2.

12.2 Project Reference Group Functions

12.2.1 The functions of the Project Reference Group will include:

- 12.2.1.1 overseeing and facilitating matters with respect to the Agreement, including but not limited to monitoring and reporting;
- 12.2.1.2 overseeing and reviewing the progress of the Project including but not limited to issues relating to Project budget, Milestones, Payment Deliverables, risk and quality;
- 12.2.1.3 facilitating discussions between senior Personnel of TFV and the Port Manager with a view to reaching a consensus on issues relating to the Project;
- 12.2.1.4 reviewing and commenting on any strategy or documentation to contract goods or services for the Project;
- 12.2.1.5 reviewing and commenting on any proposals to amend the Project Brief and/or any proposed material variations, including considering any risk or liability issues arising from the amendments or variations;
- 12.2.1.6 suggesting and drafting amendments to the Project Brief;
- 12.2.1.7 identifying and facilitating any approvals, consents or the like that may be required in order to carry out the Project or implement an amendment to the Project Brief;
- 12.2.1.8 considering any matter relevant to the Project as may be raised by either party; and
- 12.2.1.9 making recommendations to the parties in relation to any dispute or conflict between the parties.

12.2.2 The Project Reference Group will carry out its functions for the Term.

12.2.3 Neither TFV nor the Port Manager will be bound by any recommendation made by the Project Reference Group, but may take into account any

such recommendation in exercising its duties, discretions and powers under this Agreement.

13. AUDITING, REPORTING AND RECORD-KEEPING

13.1 Reports

13.1.1 The Port Manager must provide to TFV each of the reports specified in Schedule 5.

13.1.2 Each report must contain the information specified in Schedule 5.

13.2 Statement of Compliance

13.2.1 Without limiting clause 13.1, if requested by TFV's Representative, the Port Manager must submit to TFV's Representative:

13.2.1.1 a statement of compliance signed by an authorised representative of the Port Manager certifying:

13.2.1.1.1 that the Funds have been expended solely for the purposes of the Project; and

13.2.1.1.2 that the terms and conditions of this Agreement have been complied with, or, where any terms or conditions have not been complied with, the reasons for such non-compliance; and

13.2.1.2 a financial report detailing expenditure in relation to the Project,

within the timeframe requested by TFV's Representative.

13.3 Records

13.3.1 The Port Manager must establish and maintain proper books of account of all transactions relating to the Funds and operating records necessary to afford a correct and complete record and explanation of all expenditure by the Port Manager of the Funds, including:

13.3.1.1 proper books of account; and

13.3.1.2 disbursement records.

Such records must be maintained in accordance with accounting principles generally applied in commercial practice and to an auditable standard, as required by any Relevant Legislation or any applicable Victorian Government policies.

13.3.2 The Port Manager must establish and maintain records of the Project-related activities undertaken by or on behalf of the Port Manager to enable TFV to undertake an audit of such activities.

13.4 Inspection of Records and Audit

- 13.4.1 The Port Manager must give TFV's Representative, or a third party nominated by TFV's Representative (including an auditor appointed by TFV), access to the information referred to in clause 13.3, or in any other clause of this Agreement, to enable TFV's Representative or the third party to:
- 13.4.1.1 determine whether the Port Manager is complying with all of its obligations under this Agreement; and
 - 13.4.1.2 ascertain any other matters reasonably considered by TFV's Representative or the third party to be relevant to the performance of the Port Manager's obligations under this Agreement.
- 13.4.2 If requested by TFV's Representative or an auditor appointed by TFV, the Port Manager must provide to TFV's Representative documentation evidencing costs, losses or expenses incurred by the Port Manager in undertaking the Project, or part of the Project, as soon as possible and in any event within five Business Days of receiving such a request.

14. INDEMNITY

In accordance with clause 5.3.12 of the Indemnity Policy, the parties acknowledge that the use of contractual indemnities between Government entities is not recommended. The parties agree that this Agreement is an appropriate mechanism to identify and state the respective roles and responsibilities of the parties. Any dispute relating to any actions, claims or losses (including liability for loss) arising from or in connection with this Agreement shall be determined in accordance with clause 23.

15. INSURANCE

15.1 Insurances to be taken out by the Port Manager

The Port Manager must:

- 15.1.1 effect and maintain the insurances specified in item 1 of Schedule 4;
- 15.1.2 ensure that any subcontractors engaged by the Port Manager effect and maintain the insurances specified in item 2 of Schedule 4; and
- 15.1.3 effect and maintain any other insurance policies required by law.

15.2 Proof of Insurance

The Port Manager must, upon request by TFV provide TFV with copies of certificates of currency for any insurances referred to in clause 15.1.

16. ASSIGNMENT

- 16.1 The Port Manager must not:
- 16.1.1 sell, transfer, delegate, assign, licence; or

16.1.2 mortgage, charge or otherwise encumber,

any right under this Agreement to any person (**Proposed Assignee**), or permit a Proposed Assignee to assume any obligation under this Agreement without the prior written consent of TFV which may be withheld in the absolute discretion or subject to conditions required by TFV.

16.2 Without limiting clause 16.1, the assigning party must pay all fees and expenses (including legal fees on a solicitor/own client basis) incurred by TFV in connection with the proposed assignment and the investigation of the Proposed Assignee, whether or not consent is granted.

16.3 Without limiting clause 16.1, the assigning party must deliver to TFV:

16.3.1 the name, address and occupation of the Proposed Assignee;

16.3.2 two written references as to financial circumstances of the Proposed Assignee;

16.3.3 an agreement in a form approved by TFV, executed by the Proposed Assignee, in which the Proposed Assignee agrees to perform the obligations of the assigning party under this Agreement;

16.3.4 if required by TFV, a guarantee in a form approved by TFV executed by persons approved by TFV, guaranteeing the performance of the Proposed Assignee's obligations; and

16.3.5 any other documents reasonably required by TFV.

17. INTELLECTUAL PROPERTY

17.1 All Intellectual Property created in relation to the Project or in any reports, documents or other material created for the purposes of or as a consequence of the Port Manager performing or complying with its obligations under this Agreement, vest in the Port Manager upon creation.

17.2 The Port Manager grants to TFV a world-wide, non-exclusive, royalty-free, paid up, non-exclusive licence (including the right to sub-licence) to reproduce, publish, adapt, modify or otherwise use for non-commercial purposes the reports and any documents and other materials provided by the Port Manager under this Agreement.

17.3 The Port Manager warrants that any Intellectual Property used by it in connection with the Project and this Agreement (including any documents and other materials prepared for the purposes of the Project and this Agreement) are the sole property of the Port Manager or the Port Manager is legally entitled to use such Intellectual Property and is able to grant the licence under clause 17.2.

18. VARIATION

This Agreement may only be varied or replaced by an agreement duly executed by the parties.

19. DEFAULT AND TERMINATION

- 19.1 TFV may terminate this Agreement immediately by notice in writing to the Port Manager if:
- 19.1.1 the Port Manager fails to comply with any of the conditions set out in clause 4;
 - 19.1.2 the Port Manager engages in any conduct that causes or may cause imminent and serious risk to the health or safety of a person, or to the reputation, viability or profitability of the Project or TFV's provision of Funds for the Project;
 - 19.1.3 the Port Manager is dissolved or amalgamated with another entity;
 - 19.1.4 the Port Manager commits an act of insolvency or enters into a scheme of arrangement or composition with creditors or a liquidator, receiver or receiver and manager, administrator or controller of the Port Manager or any of its assets is appointed;
 - 19.1.5 the Port Manager is found guilty of any criminal offence other than an offence that, in TFV's opinion, does not affect the Port Manager's ability to undertake and complete the Project properly;
 - 19.1.6 there is any wilful failure or neglect on the part of the Port Manager in undertaking the Project, any act of serious misconduct or any other serious or persistent breach of any of the terms of this Agreement; or
 - 19.1.7 TFV is entitled to do so in accordance with any other clause of this Agreement (excluding clause 20).
- 19.2 If TFV terminates this Agreement pursuant to clause 19.1:
- 19.2.1 the Port Manager must immediately cease all work on the Project and take all appropriate action necessary to minimise further expenditure of the Funds;
 - 19.2.2 TFV will not make any further payment of Funds;
 - 19.2.3 the Port Manager must, within 30 Business Days, repay to TFV all Funds that have not been expended as at the date of termination; and
 - 19.2.4 the Port Manager comply with any directions given by TFV in a notice under clause 19.1 in relation to the transition of the Project to TFV or any third party.

20. TERMINATION FOR CONVENIENCE

- 20.1 In addition to TFV's rights under clause 19.1, TFV may terminate this Agreement at any time before the end of the Term with or without a reason by giving the Port

Manager 30 Business Days' notice in writing of TFV's intention to terminate this Agreement, after which this Agreement is at an end.

- 20.2 On receipt of a notice terminating the Agreement under clause 20.1,
- 20.2.1 the Port Manager must immediately cease all work on the Project and take all appropriate action to mitigate any loss or prevent any further costs being incurred with respect to the Agreement;
 - 20.2.2 the Port Manager will not be entitled to be paid any additional compensation by TFV in respect of the termination; and
 - 20.2.3 the Port Manager must comply with any directions given by TFV in a notice given under clause 20.1 in relation to the transition of the Project to TFV or any third party.
- 20.3 If TFV gives a notice under clause 20.1, TFV must pay the reasonable expenses of the Port Manager for all work performed by the Port Manager on the Project in accordance with the Agreement up to the date of termination plus all costs which, in the opinion of TFV are reasonable.
- 20.4 If the Funds paid by TFV to the Port Manager exceeds the amount determined in accordance with clause 20.3, TFV may in its absolute discretion seek reimbursement of the excess.

21. PUBLICATION OF PROMOTIONAL MATERIAL

- 21.1 Except as required by law, the Port Manager may not make any public announcement or issue any promotional material or press release relating to:
- 21.1.1 the Project;
 - 21.1.2 any negotiations between the Port Manager and TFV; or
 - 21.1.3 the existence or subject matter or terms of this Agreement,
- without the prior written consent of TFV.
- 21.2 Where TFV gives consent under clause 21.1, or where otherwise requested by TFV, the Port Manager must acknowledge TFV's assistance in all publications and promotional materials relating to the Project by prominently displaying in such publications and on such promotional materials the statement and logo to be provided by TFV's Representative.

22. CONFIDENTIALITY AND RESTRICTIONS AFTER TERMINATION

22.1 Return of Property

Upon the termination of this Agreement, if requested by TFV, the Port Manager must return to TFV's Representative all manuals, drawings, computer programs and other documents supplied by TFV or TFV's Representative to the Port Manager and any other property belonging to TFV relating to delivery of the Project. If requested by TFV, the Port Manager must not retain copies of any documents that it is returning.

22.2 Use of Information

The Port Manager must not, whether during or after the Term, make any improper use of:

- 22.2.1 any trade secrets and any financial, accounting, marketing and technical information, customer and supply lists, pricing information, ideas, inventions, techniques, systems, concepts, formulae, know how, technology, operating procedures, processes, knowledge and other information belonging to, used by or relating to TFV in the conduct of its business or gained as a result of the Port Manager's involvement with TFV at any time;
- 22.2.2 the position of TFV on any confidential matter; or
- 22.2.3 any other information which may be detrimental to the interests of TFV or any other person who has provided information to TFV on a confidential basis, unless the Port Manager is required to disclose the information by law.

22.3 Non-Disclosure

- 22.3.1 The Port Manager must not disclose to any third party or use any material or information referred to in clauses 22.2.1 to 22.2.3 without the prior written consent of TFV which may be withheld in TFV's absolute discretion or subject to conditions required by TFV.
- 22.3.2 The Port Manager may only use any material or information referred to in clauses 22.2.1 to 22.2.3 provided by TFV for the sole purpose of undertaking the Project.
- 22.3.3 The Port Manager must take or cause to be taken all necessary precautions to maintain the secrecy and confidentiality of any material or information referred to in clauses 22.2.1 to 22.2.3, including using their best endeavours to prevent improper publication or disclosure by a third party.
- 22.3.4 The Port Manager acknowledges that TFV may be required to publish either summary details of this Agreement or the Agreement itself on the internet or otherwise and the Port Manager consents to TFV fulfilling any such requirement.

23. DISPUTE RESOLUTION

If there is a dispute between the parties related to the Agreement, then the dispute will be resolved in accordance with the Dispute Guidelines.

24. GST

24.1 GST Inclusive

Except as otherwise provided by this clause, all Consideration payable under this Agreement in relation to any Supply is inclusive of GST.

24.2 Increase in Consideration

To the extent that any Supply under this Agreement constitutes a Taxable Supply, the Consideration payable by the Recipient to the Supplier will be increased by the applicable amount of GST (**GST Amount**), which shall be calculated by multiplying the amount upon which GST is payable by the prevailing rate of GST.

24.3 Payment of GST

Any GST Amount must be paid by the Recipient to the Supplier at the same time and in the same manner as the relevant Consideration is paid or given under this Agreement, without any right of set-off or deduction (unless otherwise provided in this Agreement).

24.4 Reimbursements

If this Agreement requires the Recipient to pay, reimburse or contribute to any expense, loss or outgoing suffered or incurred by the Supplier, the amount which the Recipient must pay, reimburse or contribute will be the amount net of any Input Tax Credits to which the Supplier is entitled to claim in respect of the outgoing, in addition to any GST Amount if the payment, reimbursement or contribution constitutes a Taxable Supply by the Supplier to the Recipient.

24.5 Tax Invoice

The Supplier must issue the Recipient with a valid Tax Invoice at or prior to the time of payment of any GST Amount.

24.6 Adjustments & Adjustment Notes

To the extent that any Adjustment occurs in relation to a Taxable Supply, the Supplier must issue an Adjustment Note to the Recipient within five Business Days of becoming aware of the Adjustment, and any payment necessary to give effect to such Adjustment must be made within five Business Days after the date of receipt of the Adjustment Note.

25. GENERAL

25.1 Entire Understanding

This Agreement contains the entire understanding between the parties as to the subject matter contained in it. All previous agreements, representations, warranties, explanations and commitments, expressed or implied, affecting this subject matter are superseded by this Agreement and have no effect.

25.2 Further Assurance

Each party must promptly execute and deliver all documents and take all other action necessary or desirable to effect, perfect or complete the transactions contemplated by this Agreement.

25.3 Legal Costs and Expenses

Each party must pay its own legal costs and expenses in relation to the negotiation, preparation and execution of this Agreement and other documents referred to in it, unless expressly stated otherwise.

25.4 Waiver and Exercise of Rights

25.4.1 A single or partial exercise or waiver of a right relating to this Agreement does not prevent any other exercise of that right or the exercise of any other right.

25.4.2 No party will be liable for any loss or expenses incurred by another party caused or contributed to by the waiver, exercise, attempted exercise, failure to exercise or delay in the exercise of a right.

25.5 Time of the Essence

Time is of the essence as regards all dates, periods of time and times specified in this Agreement.

25.6 No Relationship

No party to this Agreement has the power to obligate or bind any other party. Nothing in this Agreement will be deemed to authorise or empower any of the parties to act as agent for or with any other party.

25.7 Rule of Construction

In the interpretation of this Agreement, no rule of construction applies to the disadvantage of the party preparing the Agreement on the basis that it put forward this Agreement or any part of it.

26. NOTICES

26.1 Service of Notice

A notice or other communication required or permitted, under this Agreement, to be served on a person must be in writing and may be served:

26.1.1 personally on the person;

26.1.2 by leaving it at the person's current address for service;

26.1.3 by posting it by prepaid post addressed to that person at the person's current address for service; or

26.1.4 by email to the person's current email address for service, provided that the party giving notice obtains a confirmation report or other written evidence that the email has reached the recipient's mailbox.

26.2 Particulars for Service

- 26.2.1 The particulars for service of TFV are provided in item 8 of Schedule 1.
- 26.2.2 The particulars for service of the Port Manager are provided in item 10 of Schedule 1.
- 26.2.3 Any party may change the particulars for service by giving written notice to the other party.
- 26.2.4 If the person to be served is a company, the notice or other communication may be served on it at the company's registered office.

26.3 Time of Service

A notice or other communication is deemed served:

- 26.3.1 if served personally or left at the person's address, upon service;
- 26.3.2 if posted within Australia to an Australian address, six Business Days after posting;
- 26.3.3 if served by email, subject to clause 26.3.4, at the time the notice or other communication comes to the attention of the addressee;
- 26.3.4 if received after 6.00pm in the place of receipt or on a day which is not a Business Day, at 9.00am on the next Business Day.

27. INTERPRETATION

27.1 Governing Law and Jurisdiction

This Agreement is governed by and is to be construed in accordance with the laws of Victoria. Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Victoria and waives any right to object to proceedings being brought in those courts.

27.2 Persons

In this Agreement, a reference to:

- 27.2.1 a person includes a firm, partnership, joint venture, association, corporation or other corporate body;
- 27.2.2 a person includes the legal personal representatives, successors and permitted assignees of that person; and
- 27.2.3 any body which no longer exists or has been reconstituted, renamed, replaced or whose powers or functions have been removed or transferred to another body or agency, is a reference to the body which most closely serves the purposes or objects of the first-mentioned body.

27.3 Joint and Several

If a party consists of more than one person, this Agreement binds them jointly and each of them severally.

27.4 Legislation

In this Agreement, a reference to a statute includes regulations under it and consolidations, amendments, re-enactments or replacements of any of them.

27.5 This Agreement, Clauses and Headings

In this Agreement:

- 27.5.1 a reference to this Agreement or other document includes the document as varied or replaced regardless of any change in the identity of the parties;
- 27.5.2 a reference to a clause, schedule, appendix or annexure is a reference to a clause, schedule, appendix or annexure in or to this Agreement all of which are deemed part of this Agreement;
- 27.5.3 a reference to writing includes all modes of representing or reproducing words in a legible, permanent and visible form;
- 27.5.4 headings and sub-headings are inserted for ease of reference only and do not affect the interpretation of this Agreement;
- 27.5.5 where an expression is defined, another part of speech or grammatical form of that expression has a corresponding meaning; and
- 27.5.6 where the expression **including** or **includes** is used it means 'including but not limited to' or 'including without limitation'.

27.6 Severance

- 27.6.1 If a provision in this Agreement is held to be illegal, invalid, void, voidable or unenforceable, that provision must be read down to the extent necessary to ensure that it is not illegal, invalid, void, voidable or unenforceable.
- 27.6.2 If it is not possible to read down a provision as required in this clause, that provision is severable without affecting the validity or enforceability of the remaining part of that provision or the other provisions in this Agreement.

27.7 Counterparts

This Agreement may be executed in any number of counterparts all of which taken together constitute one instrument.

27.8 Currency

In this Agreement, a reference to '\$' or 'dollars' is a reference to Australian dollars.

27.9 Business Day

If a payment or other act is required by this Agreement to be made or done on a day which is not a Business Day, the payment or act must be made or done on the next following Business Day.

27.10 Number and Gender

In this Agreement, a reference to:

27.10.1 the singular includes the plural and vice versa; and

27.10.2 a gender includes the other genders.

27.11 Survival of Terms

The provisions of this Agreement which by their nature survive termination or expiry of this Agreement will survive termination or expiry of this Agreement.

EXECUTED by the parties as an Agreement

SIGNED by the **HEAD, TRANSPORT
FOR VICTORIA** on behalf of the
**CROWN IN RIGHT OF THE STATE
OF VICTORIA** in the presence of:

Witness (Signature)

TFV's Representative (Signature)

Witness (Print name)

TFV's Representative (Name)

Date:

[Insert Port Manager's execution clause]

Date:

Schedule 1 – Details

Item	Item Description	Details
1	Commencement Date:	
2	Completion Date:	
3	Term:	
4	Funds:	GST Exclusive: GST Inclusive:
5	Port Manager's Contribution:	GST Exclusive: GST Inclusive:
6	Asset:	
7	TFV's Representative:	
8	TFV's Particulars for Service:	Person: Title: Address: Email address:
9	Port Manager's Representative:	
10	Port Manager's Particulars for Service:	Person: Title: Address: Email address:

Schedule 2 – Project Brief

Schedule 3 – Milestones and Payment Deliverables

No.	Milestone or Payment Deliverable	Evidence required to demonstrate that the Milestone has been achieved	Date for Reaching Milestone or providing Payment Deliverable	Funding Contributed excl GST	Port Manager's Contribution excl GST	Cumulative Cashflow excl GST
1						
2						
3						
4						
5						
6						
7						
8						
9	TOTAL					

[Note 1: Examples of payment deliverables include: provision of a signed copy of the funding agreement, provision of project plan, provision of a signed copy of the subcontract for works, provision of invoices to evidence certain amounts of expenditure, provision of project status reports, provision of final report]

[Note 2: Examples of evidence to demonstrate achievement of Milestones include: project plan, milestone report, final reports, photographs, site inspection by TFV, certificate of practical completion.]

Schedule 4 – Insurance

1. Insurance – Port Manager:

2. Insurance – Port Manager’s subcontractors:

Schedule 5 – Reporting Requirements

[Drafting note: The reports listed below are examples only.]

[Note: If the report is a Payment Deliverable, specify the date for provision of the report in the “Date for Reaching Milestone or providing Payment Deliverable” column of the Milestones and Payment Deliverables table.]

If the milestone report (or other type of report) is evidence required to demonstrate a particular Milestone has been achieved, you do not need to specify a date for provision of the report because there is a date in the Milestones and Payment Deliverables table for reaching the Milestone. Payment of Funds by TFV depends on the provision of supporting evidence (see clause 3.1).

If the report is not required as evidence to support a Milestone and is not a Payment Deliverable (i.e. it is a reporting requirement not linked to payment of Funds), then specify the date for provision of the report in this Schedule 5.]

1. Project Plan

The project plan must be provided [by [date] / by the date specified in the Milestones and Payment Deliverables table at Schedule 3] and must confirm the following information as a minimum:

- [insert details as relevant to the Project]

2. Milestone Report

Each milestone report specified in the Milestones and Payment Deliverables table at Schedule 3 as evidence required to demonstrate that a Milestone has been achieved must contain the following information (at a minimum) in relation to the relevant Milestone:

- a description of the Milestone;
- report on the progress of the Project;
- the outcomes achieved as a result of the Milestone (for example, in terms of quality, timing and budget);
- any variations from the Milestone;
- the impact that achieving the Milestone has or may have on any other Milestone; and
- any issues, opportunities or lessons that arose in relation to the Milestone or the Project.

3. Project Status Report

Each project status report must be provided [by the dates set out below / by the dates specified in the Milestones and Payment Deliverables table at Schedule 3] and must contain the following information (at a minimum):

- report on the progress of the Project;

- the outcomes achieved in relation to the Project (for example, in terms of quality, timing and budget);
- any issues, opportunities or lessons that arose in relation to the Project.

4. Final Report

The final report must be provided [by [date] / by the date specified in the Milestones and Payment Deliverables table at Schedule 3] and must contain the following information (at a minimum):

- provide evidence that the Project has been completed
- provide evidence that the [infrastructure] is operating
- the outcomes achieved in relation to the Project (for example, in terms of quality, timing and budget);
- any issues, opportunities or lessons that arose in relation to the Project.
- [other]

5. Post Completion Evaluation Report

The post-completion evaluation report must be provided [12 months after the Completion Date] and must:

- evaluate the impact of the completed Project
- [other]

[END OF TEMPLATE FUNDING AGREEMENT – Note: Remove this text when drafting any funding agreements.]

Schedule 4 – Annual Report Template

This template is provided as a guide only for Local Port Managers in the preparation of their Annual Report. The Annual Report must contain, as a minimum, the sections described here.

Cover Sheet

Table of Contents

Introduction

--

Chair's Report

--

Executive Officer's Report

--

Committee

Description

Include details of:

- Members of the committee/governing body
- Number of meetings held
- Attendance of members at each meeting

Summary of Operations

Description

This is a non-financial summary of operations and may include:

- Number of berths and mooring permits
- Number of itinerant vessel berthing
- Amount of dredging undertaken
- Major works completed/underway/planned
- Maintenance works completed
- events

Performance/Program Reporting

Description

Include details of performance against:

- program delivery (as per clause 7.3.1.2 of the management agreement)
- objectives and projected performance, including explanations of objectives or projected performance not achieved

Schedule 4 – Annual Report Template

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- Amount of dredging undertaken
- Major works completed/underway/planned
- Maintenance works completed
- events

Performance/Program Reporting

Description

Include details of performance against:

- program delivery (as per clause 7.3.1.2 of the management agreement)
- objectives and projected performance, including explanations of objectives or projected performance not achieved

- SEMP
- Incident reports (as per clause 7.3.1.3 of the management agreement)

Projected Performance for the coming year

--

Disclosures

Description

This includes details of disclosures, if any, under:

- The Freedom of Information Act 1982
- The Protected Disclosure Act 2012

FOI Disclosures

--

Annual Financial Report

As per clause 7.3.1 of the management agreement.

Schedule 5 – Business Plan Template

This template is provided as a guide only for Local Port Managers in the preparation of their annual Business Plan. The Business Plan must contain, as a minimum, the sections described here.

Cover Sheet

Table of Contents

Executive Summary

Description
<p>The Executive Summary provides:</p> <ul style="list-style-type: none"> • an overview of the local port; • briefly mentions major events; and • identifies the strategic direction of the organisation over the time frame of the plan. <p>An executive summary can outline past achievements, strengths, outlines future challenges and performance targets and recommendations</p> <p>Hint: write last</p>

Purpose of the Business Plan

Description
<p>This section will describe why the business plan is being developed.</p> <p>Likely reasons are to enable all stakeholders to understand:</p> <ul style="list-style-type: none"> • future directions • needs and challenges • proposed implementation plans <p>Hint: Consider who will read this – e.g. TFV, users</p>

Organisational Structure

Description
<p>This would include:</p> <ul style="list-style-type: none"> • brief outline of governance arrangements e.g. Committee of Council • the organisational chart

Business Overview

Description
<p>This can include the following sections:</p> <ol style="list-style-type: none"> 1. <u>Background and Organisational History</u> 2. <u>Local Port Facilities</u> <p>A brief overview of what facilities are available</p> 3. <u>Accountability</u> <p>Detail the responsibilities of TFV, TSV, Local Port, Other – make it clear to all</p> 4. <u>Key activities/responsibilities</u> <p>e.g. dredging, mooring allocation Capital works program</p> <p>Hint: write for external audience</p>

Major Assumptions

Description
<p>This section should includes details on short and long term:</p> <ul style="list-style-type: none"> • goals; • objectives; • strategies; and • action plans, <p>and the underlying assumptions on which they are based.</p> <p>Some sample assumptions could be:</p> <ul style="list-style-type: none"> • The organisation will receive funding from Government of \$X per annum over a three year period. • The port manager has to comply with statutory obligations. • The port manager will require additional administration support staff.

SWOT

Description
<p>This section demonstrates your understanding of the potential and limitations of the business. The following are examples:</p>

Strengths

- good reputation with users
- sheltered harbour
- good quality facilities
- high user demand
- strong tourism

Weaknesses

- demand for berthing exceeds supply
- no support facilities such as slipway or pump out facilities

Opportunities

- growth in recreational fishing and boating
- strong tourist town

Threats

- declining grant funding opportunities
- increasingly stringent dredging requirements

Hint: Use standard SWOT analysis techniques

Risk Analysis**Description**

This would generally be in table format and include:

- description of the risk
- impact
- minimisation strategy

The SEMP covers the some of the risk, and can be attached as an appendix.

Goals and Strategies**Description**

Describe goals and strategies to achieve goals

3 Year Financial Plan including detailed Annual Budget

Attach the budget prepared in accordance with clause 7.1.1 of the management agreement.

Schedule 6 – Reporting

Report to TFV	Date	Who	Clause
Business Plan	31 March	Port Manager	5.1
Annual Budget	31 March	Port Manager	7.1.1
Asset Register	31 March	Port Manager	4.5.3
Annual Report	30 September	Port Manager	7.3.1
Asset Management Plan	30 September 2018	Port Manager	10.3
Incident	Immediately	Port Manager	8.1.4

Response by TFV	Date	Who	Clause
Business Plan	31 May	TFV	5.2.1
Annual Budget	31 May	TFV	7.1.2
Operating and Maintenance Funding confirmation and estimate	30 June	TFV	6.2